IN THE HIGH COURT OF DELHI

FAO No.54/2003

Smt. Kanta Devi ..... Appellant
! through: Mr.K.K.Bhatia, Adv.

VERSUS

$ State & Anr. ..... Respondents
^ through: Mr.B.B.Gupta, Adv .

% DATE OF DECISION: 19.11.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: PRADEEP NANDRAJOG, J. (Oral)

1. Ramwati's estate was litigated upon. Shri Krishan as also Kanta Devi filed 2 petitions seeking probate of respective will relied upon and as stated to be executed by Ramwati. Petition seeking probate filed by Shri Krishan was registered as PC-19/2002. Petition seeking probate filed by Kanta Devi was registered as PC-432/2001. Both petitions were filed 3 years after the date of death of Ramwati. A preliminary issue pertaining to the maintainability of the probate petitions with reference to the law of limitation was framed in both petitions. Both petitions were disposed of vide common order dated 26.10.2002 holding

that both petitions were barred by limitation. In taking the view, decision of this Court reported as 2000 RLR 137 *Pamela Man Mohan Singh vs. State* was relied upon.

2. It is not in dispute that the said view has since been dissented from by a larger Bench of this Court holding that pertaining to grant of probates of a will since a will is a indenture of entrustment till trust is discharged, remedies can always be invoked pertaining to grant of probate.

3. In that view of the matter, impugned order dated 26.10.2002 cannot be sustained.

4. But, a problem has arisen. Whereas Kanta Devi, the petitioner of Probate Case No.432/2001 has challenged the order dated 26.10.2002, Shri Krishan, the petitioner of Probate Case No.19/2002 has not challenged the said order.

5. If petition is allowed, which it has to be, petition filed by the petitioner would be restored. What happens to the claim of ShriKrishan?

6. He certainly would have a right to oppose grant of probate as prayed by Kanta Devi and for said reason he can rely upon the will which he propounded in Probate Case No.19/2002.

7. Does he have any other right? In my opinion, yes. The right flows to him from the decision of the Division Bench of this Court reported as 91 (2001) DLT 702 *Suraj Bhan & Anr. vs.*

Rajinder Pal Singh Lamba & Ors. The Division Bench construed the ambit of Rule 33 of Order 41 of the Code of Civil Procedure and held that a narrow meaning to said rule would empower the Appellate Court, to do complete justice, to pass necessary orders in respect of all issues although the respondent may not have filed an appeal or an objection to the decree impugned.

8. I note that with effect from 1.2.1977, Rule 33 of Order 41 of the Code of Civil Procedure has been amended and includes the power to vary or alter a decree or an order where the decree relates to cross suits or where 2 or more decrees are passed in one suit, though cross appeal may not have been filed. Meaning thereby, as in the instant case, where on a common question of law, 2 cross probate petitions stand disposed of holding that both were barred by limitation, if it is held that the petitions were not barred by limitation, notwithstanding that Shri Krishan has not filed an appeal pertaining to dismissal of his probate petition, this Court would be empowered to restore even probate petition filed by Shri Krishan.

9. The petition accordingly stands disposed of quashing the impugned order dated 26.10.2002. Both probate petitions i.e. PC No.19/02 filed by Shri Krishan and PC No.432/2002 filed by Kanta Devi are restored. Both would be decided simultaneously.

10. Copy of this order be supplied dasti to learned counsel

for the parties.

11. LCR be returned.

November 19, 2007 **PRADEEP NANDRAJOG, J.**
dk-bainsla